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IN THE
SUPREME COURT OF THE UNITED STATES

TERM, 1978

NO. 77-6701

HERBERT BURNFIN,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE MISSOURI SUPREME COURT

BRIEF FOR RESPONDENT IN OPPOSITION

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TABLE OF CASES

State v. Herbert Burnfin, 560 S.W.2d 283 (1977);

Taylor v. Louisiana, 419 U.S. 522 (1975);

U.S. Const. amend. VI;

U.S. Const. amend. XIV;

Art. 1, § 22(b), Mo. Const.;

Section 494.020, RSMo 1969;

Section 494.031, RSMo 1969;

Chapter 497, RSMo 1969.

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OPINION BELOW

The opinion of the Missouri Supreme Court is reported at 560 S.W.2d 283. A copy of that opinion appears in the petitioner's Appendix A.

JURISDICTION

On December 5, 1977, the Missouri Court of Appeals at Kansas City entered its opinion affirming the petitioner's conviction for one count of murder in the first degree. Thereafter, on December 20, 1977, petitioner filed a timely motion for rehearing. Petitioner's motion for rehearing was overruled by the Missouri Court of Appeals on December 27, 1977. Petitioner filed an application to transfer the cause to the Missouri Supreme Court on January 11, 1978. The Missouri Supreme Court denied the application for transfer on February 8, 1978.

The jurisdiction of the Court is invoked under Title 28, United States Code, Section 1257(3).

QUESTION PRESENTED

Was the petitioner's right to a fair trial denied because the Missouri Constitution gives women the right to avoid jury duty by requesting an exemption?

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth Amendment and the Fourteenth Amendment to the United States Constitution, Article I, Section 22(b) of the Missouri Constitution, Section 494.020, Section 494.031 and Chapter 497 of the Missouri Revised Statutes of 1969. These constitutional provisions and statutes are set out in full in the respondent's Appendix A.

STATEMENT

The petitioner Herbert Burnfin was convicted of murder in the first degree. Prior to his trial the petitioner filed a motion to quash the jury venire claiming that it had not been drawn from a representative cross-section of the community because of the operation of Article I, Section 22(b) of the Missouri Constitution. In support of his motion the petitioner introduced evidence to show that women over 21 years of age comprised 54.4% of the population in Jackson County, Missouri; that of the 174 persons called to jury service the week of the petitioner's trial, 21 were women; that petitioner's jury venire of 65 had 7 women; and the petit jury of 12 was totally male. Petitioner introduced evidence that the percentages of women who appeared for jury service in the months preceding his trial were as follows: June -- 15.9% women; July -- 15.1% women; August -- 13% women; September -- 13% women; and October -- 10.9% women. On the basis of this evidence the petitioner's motion to quash the jury was overruled. The issue of the constitutionality of Article I, Section 22(b), was again raised before the Missouri Court of Appeals at Kansas City. That court relying on State v. Duren, 556 S.W.2d 11 (1977), upheld the petitioner's conviction.

In order to fully understand the question presented by this case, it is necessary to consider the jury selection system which is employed in Jackson County, Missouri. That system begins with the voter registration list. From that list the jury commissioner selects at random approximately 70,000 names. A questionnaire is then sent to each individual selected. A copy of that questionnaire appears in Section 497.130, RSMo Supp. 1975, respondent's Appendix A. Among other things, that questionnaire notifies women of their right to be excused from jury duty. When these questionnaires are returned, the jury commissioner eliminates all individuals whose questionnaire indicates that they have exercised their right to be excused or that they are unqualified to serve as jurors.* The remaining pool of names is then entered into a computer and 25,000 names are randomly selected for the master jury wheel. If an individual fails to return the questionnaire then the individual's name is automatically included in the pool from which the master jury wheel is selected. In Jackson County a new jury wheel is prepared each year.

Individuals are periodically selected from the master jury wheel by computer to make up the general jury panel for all civil and criminal divisions of the Jackson County Circuit Court. Jury summonses are sent out to each one of those individuals randomly selected from the jury wheel. These summonses notify women that they have a right to be excused from jury duty. After receiving the summons, the individual is given an opportunity to present to the circuit court reasons why he or she would be unable to serve as a juror. All jurors who are not excused should appear in the circuit court for jury duty. If a woman does not appear, it is assumed that she has exercised her right not to serve. Venire

* The text of this footnote will be found immediately following the "Respondent's Appendix A", and numbered "Page F.N. 1".

panels are then randomly selected from the individuals which have appeared for jury duty and the petit jury is selected from the venire panel.

ARGUMENT

I

The decision of the Missouri Court of Appeals, Kansas City District in State of Missouri v. Herbert Burnfin is not in conflict with this Court's decision in Taylor v. Louisiana, 419 U.S. 522 (1975).

In Taylor v. Louisiana, *supra*, this Court held that the jury selection system employed by the State of Louisiana deprived criminal defendants of their right to an impartial trial. La. Const. Art. VII, Section 41 (since repealed), sets out the constitutionally offensive procedure:

"The legislature shall provide for the election and drawing of competent and intelligent jurors for the trial of civil and criminal cases; provided; however, that no women shall be drawn for jury service unless she shall have previously filed with the clerk of the district court a written declaration of her desire to be subject to such service. . . ."

This Court pointed out that this provision operated to systematically exclude women from jury service, and therefore, deprived criminal defendants of a jury composed of a fair cross-section of the community.

On the basis of the Taylor decision, the petitioner argues that he was deprived of his right to a fair trial because Article I, Section 22(b) of the Missouri Constitution allows women to avoid jury duty by requesting an exemption. The Louisiana constitutional provision cited and Article I, Section 22(b) of the Missouri Constitution, however, are readily distinguishable. In Louisiana a woman was not eligible for jury service unless she took steps to inform the court of her desire to serve as a

juror. In Missouri, on the other hand, women are automatically included in the jury list. They are excused from jury service only when they take affirmative steps to notify the court that they do not wish to serve. The Missouri system of jury selection, therefore, does not exclude women. It merely allows an exemption for those who choose to exercise it. In this Court's opinion in Taylor, it stated that ". . . jury wheels, pools of names, panels or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." Taylor v. Louisiana, supra at 538 (emphasis added). The petitioner relies heavily on this language in Taylor and yet it is evident from Article I, Section 22(b) of the Missouri Constitution that women in no way are excluded by the State of Missouri from serving on juries. They are not even remotely inhibited from serving on juries. It is solely their decision as to whether they will exercise their right to be excused.

Taylor v. Louisiana also indicates that a defendant must show that the jury wheels from which juries are chosen fail to reasonably represent a cross-section of the community. Petitioner has asserted that he has met the burden of proof imposed by Taylor v. Louisiana. In Taylor v. Louisiana, however, the evidence showed that no more than 10% of the persons on the master jury list were women, that only 12 women were among the 1,800 persons drawn to fill petit jury venires during the period when the defendant was tried; and that the 175 member venire from which the defendant's petit jury was in fact drawn had no women on it. In contrast, petitioner's own evidence shows that of the 174 persons who appeared for jury duty the week of petitioner's trial, 21 were women and the panel from which his petit jury was drawn contained 7 women. This composition could hardly be characterized as almost totally male, the standard enunciated in Taylor v. Louisiana. It seems clear that the situation in Taylor v. Louisiana, was an extreme case which resulted from the state's

requirement that women take affirmative steps to participate in the jury selection process effectively excluding women from jury service. Such is not the case in Jackson County, Missouri.

II

This case is plagued with evidentiary problems which will prevent this Court from reaching the question of whether the defendant's right to a fair trial has been denied.

The petitioner alleges that the female jury exemption in Missouri causes gross underrepresentation of women on jury panels. The record in this case, however, does not show that there is any relationship between Article I, Section 22(b), and the alleged underrepresentation of women on juries in Jackson County. First, the petitioner has failed to present eligible population statistics. At the hearing on his motion for new trial, the petitioner introduced the 1970 United States census figures which show that Jackson County had approximately 407,000 inhabitants over 21 years of age and 54% of those inhabitants were women. The annual Jackson County jury selection process, however, begins with the current voter registration list. No proof was made that the sexes register to vote in direct relation to their numbers or that there has not been a significant change in the makeup of Jackson County, Missouri, between 1970 and 1975 when the petitioner's jury was selected. As stated by the Missouri Supreme Court in State v. Duren, 556 S.W.2d 11 (1977):

"All of this suggests that statistics of current 'eligible population' referred to in Alexander v. Louisiana, supra, not six year old gross' population figures, provide the proper starting point."

More importantly, the petitioner has failed to produce any evidence to show that the percentage of women who actually appeared in court for jury service was less than the percentage of women initially summoned for jury service because a substantial number of women exercised their right to drop out of the

jury process solely because of their sex. Section 494.020, RSMO Supp. 1975, provides exemption for groups other than women. For example, clergymen, doctors, teachers, dentists, or any person over sixty-five years of age are also entitled to automatic exemption from jury service. It is possible that the alleged disparity between the number of men and women on the petitioner's venire resulted from women exercising occupational or physical exemptions. Furthermore, the petitioner has failed to show that this numerical disparity was not the result of ~~random~~ chance. Hence, the petitioner's statistical evidence, standing alone, fails to show that the petitioner's jury was not drawn from a representative cross-section of the community because of the number of women who exercised their right to excuse themselves from jury service solely on the basis of their sex.

In Taylor v. Louisiana, supra at 524, the parties stipulated that the "discrepancy between females eligible for jury service and those actually included in the venire was the result of the operation of the Louisiana Constitution." No similar stipulation has been made in this case.

III

The scope of the question presented by this petition is so narrow that a decision by this Court will have little application.

Only the State of Missouri and the State of Tennessee still allow women an exemption from jury duty and the only place in the State of Missouri that this issue has been raised is in Jackson County, Missouri. No complaint has been heard from any other part of the State of Missouri, although this issue has been well publicized. The scope of this petition therefore is so narrow that review by this Court is not warranted.

CONCLUSION

Wherefore, respondent respectfully requests this Court to deny the petitioner's writ of certiorari to the Missouri Supreme Court.

Respectfully submitted,

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